Supreme Court, U.S.
FILED
FEB 8 - 2000
CLERK

No. 99-1148

In The

Supreme Court of the United States

PETER CANNICE,

Petitioner,

v.

NORWEST BANK, N.A., NORWEST BANK CARD SERVICES, N.A.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

DEBORAH M. THARNISH
Counsel of Record
JO ELLEN WHITNEY
DAVIS, BROWN, KOEHN, SHORS & ROBERTS, P.C.
The Financial Center, Suite 2500
666 Walnut Street
Des Moines, Iowa 50309-3993
(515) 288-2500

Counsel for Respondents

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29(6) of the Rules of the Supreme Court of the United States, Norwest Bank Iowa, N.A. and Norwest Bank Iowa, N.A. Card Services Division, by and through their attorneys, make the following corporate disclosure statement:

Norwest Bank Iowa, N.A., and its division, Norwest Bank Iowa, N.A. Card Services Division, have as their parent company Wells Fargo and Company. Wells Fargo and Company is a company that issues shares to the public.

TABLE OF CONTENTS

Page

Corporate Disclosure Statement i

Table of Contents ii

Table of Authorities iii

Statement of the Case 1

Argument 3

I. THE COURT OF APPEALS DID NOT ENGAGE IN AN IMPROPER REVIEW OF THE JURY'S FINDINGS OF FACT UPON LIABILITY FOR DISCRIMINATION 3

II. THE COURT OF APPEALS PROPERLY APPLIED THE BURDEN OF PROOF IN AN AMERICANS WITH DISABILITIES ACT CASE FOR DISCRIMINATION BASED ON A FAILURE OF REASONABLE ACCOMMODATION 7

Conclusion 9

TABLE OF AUTHORITIES

Page

CASES

Baskerville v. Culligan International Co., 50 F.3d 428 (7th Cir. 1995) 4

Chicago Title Insurance Co. v. Resolution Trust Corp., 53 F.3d 899 (8th Cir. 1995) 5

DeAngelis v. El Paso Municipal Police Officers Ass'n, 51 F.3d 591 (5th Cir.), *cert. denied*, 516 U.S. 974 (1995) 4

Faragher v. City of Boca Raton, 524 U.S. 775, 141 L. Ed.2d 662, 118 S. Ct. 2275 (1998) 4

Fjellestad v. Pizza Hut of America, Inc., 188 F.3d 944 (8th Cir. 1999) 8

Hathaway v. Runyon, 132 F.3d 1214 (8th Cir. 1997) 4

Mole v. Buckhorn Rubber Products, Inc., 165 F.3d 1212 (8th Cir.), *cert. denied*, 145 L. Ed.2d 56 (1999) 8

Oncale v. Sundowner Offshore Services, 523 U.S. 75, 140 L. Ed.2d 201, 118 S. Ct. 998 (1998) 6

Porous Media Corp. v. Pall Corp., 110 F.3d 1329 (8th Cir. 1997) 5

Robinson v. Neodata Services, Inc., 94 F.3d 499 (8th Cir. 1996) 6

Sip-Top, Inc. v. EKCO Group, Inc., 86 F.3d 827 (8th Cir. 1996) 5

Stahl v. Sun Microsystems, Inc., 19 F.3d 533 (10th Cir. 1994) 7

Wallin v. Minnesota Dept. of Corrections, 974 F. Supp. 1234 (D. Minn. 1997), *aff'd*, 153 F.3d 681 (8th Cir. 1998) 6

TABLE OF AUTHORITIES – Continued

Page

STATUTES, REGULATIONS AND RULES

Iowa Code §§ 228.2, 229.25 (1999) 2

Rule 50(b) of the Federal Rules of Civil Procedure 3, 7, 8

STATEMENT OF THE CASE

Petitioner's statement of the case includes numerous misstatements of fact and of the record. Respondent offers the following to correct these misstatements.

Peter Cannice, an employee at Norwest Bank, N.A. (hereafter "Norwest") since July of 1988, sought the position of group leader in the collections department in 1992. While Cannice was one of the finalists for this position, the position eventually went to one of his co-workers. Shortly after Cannice was passed over for the group leader position, he complained to his manager about activities in the collections department. He complained about sexual banter in the work place, some of which he later admitted to participating in, and about a question posed to him by a co-worker relating to his religious beliefs, particularly as they related to his homosexuality. During this same time period, Cannice informed his manager that he had been diagnosed with epilepsy and might suffer seizures at the work place. He provided information relating to his seizures and the actions that Norwest personnel should take if a seizure occurred. He also informed his manager that he was "under stress". Cannice requested a private phone line to use to call his support group. It was undisputed at trial that Cannice was offered the use of either a conference room phone or his manager's phone to make such calls.

Contrary to Cannice's Petition, he did not present evidence that while he worked at Norwest that Norwest was aware that he suffered from an enlarged liver, sleep disturbances, lack of energy, inability to concentrate, or

an inability to enjoy events and social interactions. In December of 1992, Cannice left the work force, and beginning in January of 1993, he was placed on short-term, and, later, long-term disability. At the time of trial, Cannice was receiving disability payments from the Social Security Administration and long-term disability payments from a plan provided through Norwest.

Cannice complains in his Petition that "his managers frequently called him at home to ask when he would return from his disability leave" (Petition at 7)[1], and he also complains that Norwest never contacted his psychiatrist to determine possible ways to help him return to the work place. No evidence was presented at trial relating to frequent calls by managers, nor did Cannice provide a release to allow Norwest to speak with his psychiatrist.[2]

At trial, Cannice complained that he was harassed, and he sought to link this harassment to gender discrimination and retaliation claims, and, to a lesser extent, to religious and disability discrimination. Cannice dismissed his religious discrimination claim prior to the submission of this case to the jury. The jury found in favor of Norwest on the claims of sexual harassment and retaliation. The jury found in favor of Cannice on his disability discrimination and disability harassment claims. However, upon Norwest's motion under Rule

---

[1] This allegation is contradicted by Cannice's later allegation that Norwest managers *never* endeavored to talk to Cannice to find a way for him to return to work. (Petition at 19).

[2] Of course, Norwest cannot simply call an employee's psychiatrist and discuss the employee's condition. Iowa Code §§ 228.2, 229.25 (1999).

50(b) of the Federal Rules of Civil Procedure, the trial court found that Cannice had not properly presented evidence to support his claim of disability discrimination. The court let stand the judgment in Cannice's favor on disability harassment. The district court's judgment was appealed to the Eighth Circuit, which affirmed the district court's ruling on disability discrimination and ruled in favor of Norwest on the disability harassment claim.

ARGUMENT

I. THE COURT OF APPEALS DID NOT ENGAGE IN AN IMPROPER REVIEW OF THE JURY'S FINDINGS OF FACT UPON LIABILITY FOR DISCRIMINATION.

Cannice urges the Court to grant certiorari in this case to "resolve the split in the circuits over whether a court of appeals may engage in de novo review of a jury's findings of fact upon liability for discrimination" (Petition at 8). Cannice seeks review based on his claim that the Eighth Circuit engaged in de novo review in determining whether a hostile environment existed.[3] This

[3] Cannice argues that the Eighth Circuit applies a standard that juries should determine whether harassment is sufficiently hostile, severe or pervasive (Petition at 9), a standard that Cannice identifies as the proper standard. Cannice claims that this "proper" standard varies from the standard applied by the Sixth, Seventh and Ninth Circuits, which hold that a judge should make this determination as a matter of law. (Petition at 9). In fact, Norwest believes that this Court and the circuits are in agreement that the court must decide as a threshold matter whether the plaintiff can establish sufficient facts to show as a

Court must reject Cannice's request to grant certiorari because the Petitioner misapprehends the basis of the Eighth Circuit's decision in this matter, as the Eighth Circuit based its decision on Cannice's failure to show that any harassment was *because of* his disability, *not* on Cannice's failure to prove a hostile environment. Further, Cannice mistakes the standard applied by the court in reviewing the sufficiency of the evidence and misstates the quantum of evidence presented herein.

Cannice's argument focuses on whether he presented facts to the jury to show that the harassment he suffered was sufficiently severe or pervasive. Cannice argues that this is a determination that should be made by the jury, and he then cites applicable Eighth Circuit authority for this proposition. *Hathaway v. Runyon*, 132 F.3d 1214, 1221 (8th Cir. 1997). If Cannice were accurate in his understanding of the Eighth Circuit's decision herein, there would be no basis for granting certiorari. This Court should not grant certiorari to correct misapplication of legal standards, if the legal standard is correctly stated. Accordingly to Cannice, the Eighth Circuit has stated the correct standard for reviewing jury decisions in discrimination cases.

---

matter of law that a hostile environment existed. *See Faragher v. City of Boca Raton*, 524 U.S. 775, 787, 141 L. Ed.2d 662, 677, 118 S. Ct. 2275, 2283 (1998); *Baskerville v. Culligan International Co.*, 50 F.3d 428, 430 (7th Cir. 1995); *DeAngelis v. El Paso Municipal Police Officers Ass'n*, 51 F.3d 591, 597 (5th Cir.), *cert. denied*, 516 U.S. 974 (1995). After the threshold showing has been satisfied, a factual issue may exist as to whether the working environment was hostile.

However, Cannice has misconstrued the basis of the Eighth Circuit's opinion. While the Eighth Circuit noted that the evidence presented by Petitioner regarding Norwest's actions towards him could not be described as either pervasive or severe (App. at 4), the court clearly based its decision on Cannice's harassment claim on the fact that Petitioner presented insufficient evidence that the alleged harassment occurred "because of" his disability. (App. 3-4). Thus, Cannice's discussions regarding the appropriate review of whether the severe and pervasive standard has been met are inapposite.

Instead, the court here applied the appropriate legal standard in reviewing the jury's verdict and the district court's ruling on post-trial motions. Whether an issue was properly before the jury is a legal question that is reviewed de novo. *Chicago Title Insurance Co. v. Resolution Trust Corp.*, 53 F.3d 899, 904 (8th Cir. 1995). In determining whether sufficient evidence exists to support the jury verdict, the court must examine whether there is sufficient evidence for a rational trier of fact to come to the same conclusion as the jury. *See Porous Media Corp. v. Pall Corp.*, 110 F.3d 1329, 1337-38 (8th Cir. 1997). In applying this standard, the court may not accord a party the benefit of unreasonable inferences or those at war with undisputed facts. *Sip-Top, Inc. v. EKCO Group, Inc.*, 86 F.3d 827, 830 (8th Cir. 1996). A reasonable inference is one which may be drawn from the evidence without resort to speculation, and when the record contains no proof beyond speculation to support the verdict, judgment as a matter of law is appropriate. *Id.* This standard of review does not defeat a plaintiff's right to a jury trial. Instead, it provides

protection that only claims that have a sufficient legal basis are permitted.

In this case, the court properly found that there was insufficient evidence that any harassment that Cannice alleged occurred "because of" his disability. *See Oncale v. Sundowner Offshore Services*, 523 U.S. 75, 79-80, 140 L. Ed.2d 201, 208, 118 S. Ct. 998, 1002 (1998). At trial, Cannice submitted evidence of numerous acts of alleged harassment, but he asserted that this harassment occurred because of his sex and religion. In fact, his testifying psychiatrist, Dr. Preston, referred only to Cannice's complaints about sexual and religious harassment, and not to any disability harassment. (Tr. at 256-57).[4] When Cannice submitted a memorandum outlining the activity that he felt constituted a hostile work environment, he made no reference to harassment based on disability. (Exhibit 12). Cannice simply did not satisfy the legal requirement that he show that Norwest's actions occurred "because of" his disability. *See Robinson v. Neodata Services, Inc.*, 94 F.3d 499, 502 (8th Cir. 1996); *Wallin v. Minnesota Dept. of Corrections*, 974 F. Supp. 1234, 1243-44 (D. Minn. 1997), *aff'd*, 153 F.3d 681 (8th Cir. 1998) (listing of disconnected, albeit unpleasant, incidents was not sufficient to show harassment "because of" disability.). *See also Oncale v. Sundowner Offshore Services*, 523 U.S. 75, 79-80, 140 L. Ed.2d 201, 208, 118 S. Ct. 998, 1002 (1998)

---

[4] Contrary to the suggestions in Cannice's submission, neither the testimony of Cannice's rehabilitation expert nor the testimony of his psychiatrist suggested that he was forced from work due to harassment based on his disability. Neither of Cannice's experts claimed that he was harassed because of his disability.

(plaintiff required to prove that offensive actions were discrimination *because of* sex); *Stahl v. Sun Microsystems, Inc.*, 19 F.3d 533, 538 (10th Cir. 1994) ("If the nature of an employee's environment, however unpleasant, is not due to her gender, she has not been the victim of sex discrimination as a result of that environment.").

The Eighth Circuit's ruling that Cannice failed to show that he suffered harassment "because of" his disability does not establish a basis for the Court to grant certiorari here, and Cannice's Petition should be denied.

II. THE COURT OF APPEALS PROPERLY APPLIED THE BURDEN OF PROOF IN AN AMERICANS WITH DISABILITIES ACT CASE FOR DISCRIMINATION BASED ON A FAILURE OF REASONABLE ACCOMMODATION.

Cannice complains about the Eighth Circuit's conclusion that he failed to show that a reasonable accommodation would have allowed him to keep his job. Cannice claims that the court's ruling on this issue provides a basis for the grant of certiorari. Cannice's conclusion is incorrect, and the Court should refuse the certiorari petition on the issue of reasonable accommodation.

The trial court granted Norwest's Rule 50(b) motion on the issue of disability discrimination. The trial court judge, who heard the evidence and saw the witnesses, concluded that Cannice did not prove that Norwest discriminated against him by failing to reasonably accommodate him. The trial court found that there was insufficient evidence to establish a failure to reasonably accommodate.

The Eighth Circuit agreed with the trial court's conclusion, and applied the proper burden of proof in a failure of accommodation case. The Eighth Circuit first noted that a failure to engage in the interactive process does not establish a per se violation of the ADA. *See Fjellestad v. Pizza Hut of America, Inc.*, 188 F.3d 944, 952 (8th Cir. 1999). The Eighth Circuit also appropriately noted that the plaintiff in an ADA case has the burden of showing that a particular accommodation would have made the plaintiff qualified to perform his job. The only requested accommodation that Cannice pointed to in his petition for certiorari, before the trial court on the Rule 50(b) motion, and on appeal to the Eighth Circuit, was the provision of a telephone with a private line. Evidence was presented that Norwest made a private line available to Cannice, either in a conference room or in his manager's office. The Eighth Circuit found that a reasonable fact-finder could not conclude that the problems that Cannice suffered were the result of any failure by Norwest to accommodate Cannice with respect to the provision of a phone line, or that Cannice left his job because of a failure to accommodate.

While Cannice's petition is long on rhetoric regarding possible accommodations, the *only* accommodation that he even arguably requested during his employment at Norwest was the provision of a private phone line. The law is clear that Cannice had the burden to show that the accommodation that he requested would allow him to perform his job. As the Eighth Circuit noted in *Mole v. Buckhorn Rubber Products, Inc.*, 165 F.3d 1212, 1218 (8th Cir.), *cert. denied*, 145 L. Ed.2d 56 (1999), the plaintiff must provide proof that the requested accommodation would

allow the employee to perform the job to the employer's expectations. Cannice made no such proof in this matter, and no such proof could be made by him. As such, the Eighth Circuit properly concluded that Cannice did not establish his failure to accommodate claim.

Finally, Cannice argues that the Court should grant certiorari to resolve the "confusion among the circuit courts" regarding the burden of proof to be applied in failure of accommodation cases. However, Cannice has not cited any split of authority or basis for granting certiorari in this case, and thus the Court should deny the petition for certiorari.

CONCLUSION

For the reasons set forth in this brief, this Court should deny the Petition for Writ of Certiorari requested by Petitioner Peter Cannice.

Respectfully submitted,

DEBORAH M. THARNISH
JO ELLEN WHITNEY
DAVIS, BROWN, KOEHN, SHORS & ROBERTS, P.C.
The Financial Center, Suite 2500
666 Walnut Street
Des Moines, Iowa 50309-3993
(515) 288-2500

Counsel for Respondents